Mudita Chawla, Esq.
Chemtob Moss Forman & Beyda, LLP
527 Madison Avenue, 7th Floor
New York, New York 10022
(212) 317-1717
mchawla@cmfb.com

DIVIDING RETIREMENT BENEFITS AT DIVORCE: UNDERSTANDING THE QDRO PROCESS

I. If representing a party, address retirement/pension rights early on

a. At the initial intake meeting with the client, make sure to ask about retirement/pension assets when you are determining what assets are at issue in the case
    i. Obtain a complete employment history
    ii. Send out subpoenas early on in the discovery process
    iii. Value pension benefits early

II. Checklist for Pension Discovery

a. Complete employment history for your client and other party

b. Breaks in service due to child rearing or disability

c. Separate Property Issues

d. 401k and Cash Balance Plan: Value of account as of date of marriage

e. Premarital service purchased?

f. Source of funds

g. Premarital loans
    i. For what purpose?
    ii. Loans paid back with marital funds?

h. Benefits Statements

i. Prior to QDROs: survivorship option may already be spoken for

j. Even if no prior QDROs, prior marriage may mean possibility of competing spousal interests

III. Checklist for Items to Request from Plan

a. Formal name of each plan, name of Plan Administrator and address to send for QDRO review

b. All plans with that employer in which Employee is a member

c. Do not assume that the Plan Name on the member's benefits statement is the "official Plan Name" www.freeerisa.com look up plan name and plan administrator

d. Dates of membership, participation in the plan, and any breaks in service

e. Summary Plan description for each plan to which the employee belongs

f. QDRO procedures and sample QDROs

g. Benefits statements, projected benefit statements (if available) or account statements

h. Vesting provisions of Plan

i. Loans, encumbrances, withdrawals

j. Current Beneficiary designations
   - i. Beneficiary designation history
   - ii. Look for changes over the years
   - iii. Look to see if divorce planning occurred

k. Is participant retired?
   - i. If yes: copy of retirement application, option election, amount of monthly benefit and where sent, amount of life/health insurance and other deductions. Obtain a copy of spousal waiver (if Plan requires one)
   - ii. *Beware of potential fraud issues*

IV. Checklist of Other Plan Information to Request

a. Benefits enhancements, supplements and subsidies

b. How will benefit be calculated? Will unused sick leave or vacation leave affect retirement calculation?

c. Can member "cash out" of the Plan and receive a lump sum distribution? Caution spouse on risk of delaying QDRO (even if your retainer doesn't apply to the QDRO)

d. Death benefits and Survivorship option

V. Checklist of Information for When you Represent the Alternate Payee

a. Rollover available?

b. Lump sum payment option?

c. Segregated account in Alternate Payee's name

d. May AP direct her own investments?
   i. Designate a beneficiary/estate to receive her portion?

e. Forfeiture scenarios: accidental death (NYS), loss of survivorship upon remarriage

VI. Checklist for Issues To Be Aware of and Information To Include In Separation Agreements

a. Make sure the Plan will permit the contemplated division before the division is recited in the Agreement

b. Make sure that all retirement assets have been disclosed.
   i. Consider including a provision in the Agreement that has a penalty for failure to disclose

c. Make sure that death and/or disability benefits that attach to the retirement plan are addressed in the Agreement otherwise they will likely be deemed to have been waived

d. Review Plan description to determine benefits available – extra enhancements for certain types of employees, extra annuity funds etc.

e. Attach and incorporate DRO by reference

f. Always address in Agreement for any type of Plan:
   i. Who is responsible for preparing the QDRO (and for which Plan)
   ii. Who is responsible for preparation fees
   iii. Who is responsible for administrative fees charged by the Plan
   iv. Include a timeline in the Agreement for when the QDRO will be drafted and submitted to the Court if possible

g. Address each Plan with specificity and separately in the Agreement
   i. Complete Plan name
   ii. IRA account numbers
   iii. DO NOT simply say "Husband's retirement benefits" or "Wife's three IRA accounts"

h. With a Defined Benefit Plan, consider and address:
   i. Method of division: coverture, flat amount, percentage?
   ii. Separate/shared interest?
   iii. Survivorship?
   iv. Disability of Plan Participant?
   v. Cost of Survivorship option?
   vi. Effect of Plan loans?
   vii. COLAs and other post retirement supplements, recal for AP if she's commenced benefits
   viii. Early retirement subsidies
   ix. Any benefit limitations (high income pensions), reductions should be applied proportionately to both parties
   x. Consider including anti-circumvention language
   xi. Will retired P pay AP out of pocket until QDRO filed?
   xii. Retroactive assignment dates (be sure Plan will permit this before including it in the Agreement)

i. With a Defined Contribution Plans, consider and address:
   i. Valuation Date
   ii. Division of Benefits
   iii. Investment experience
   iv. Effect of loans
   v. Delayed Employer Contributions
   vi. Death of AP before segregation/after segregation

vii. Death of P before/after segregation
viii. Who is responsible for filing QDRO
ix. Who pays administrative fees

VII. Retirement Benefits and Trial

a. When is an Expert needed?

b. Do you have proof of premarital balance if you are making a separate property claim?

c. Do you have proof of gain on premarital balance?

d. Do you have proof of post marital contributions?

e. Where retirement accounts merged (i.e., premarital 401k moved into marital IRA)?

f. Do you have all the records and/or testimony you need to establish paper trail?

VIII. Client Relations Issues to be Aware of:

a. Were clients advised of necessity of pension valuation? (N.B.: if client declined, get a disclaimer in writing)

b. Explain deferred distribution vs. immediately offset

c. Effect of actuarial reductions

d. Forfeiture scenarios explained

e. Disability and/or death issues discussed and addressed?

f. Risk of Delaying QDRO explained

Benefits & Executive Compensation News

Estranged Couples to Fight Over Virus-Stung Retirement Funds

By Warren Rojas

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- QDRO filers watch account balances dwindle amid court closures
- Virus-related emergency withdrawals threaten alternate payees' benefits

The coronavirus pandemic could give estranged couples something else to fight over: shrinking retirement accounts stuck in a bureaucratic limbo between courts and plan administrators.

Retirement account-splitting agreements known as qualified domestic relations orders (QDROs) stalled by the Covid-19 outbreak must be amended post-quarantine, attorneys say, to make up for the losses benefits-seeking spouses are suffering right now.

QDROs typically take months to make their way from state courthouses to the plan administrators who then divide the corresponding retirement savings between participants and the alternate payee, usually a former spouse. In some cases, spouses that are separated but not legally divorced can get a QDRO if plan rules allow it.

The court orders apply to qualified retirement plans other then individual retirement accounts.

QDROs that have stalled anywhere along the way in recent weeks offer no protection, benefits lawyers warn, against the balance-shrinking might of tumultuous stock prices and the $100,000 in emergency withdrawals authorized by the recent stimulus bill.

Those most at risk, according to Mudita Chawla, a family law attorney at Chemtob Moss Forman & Beyda, LLP in New York City, are filers whose paperwork doesn't factor in the potential appreciation or depreciation of assets in dispute.

"There's going to be a lot of post-judgment litigation about what the alternate payee is entitled to," Chawla said of the recalibration required once the QDROs process resumes. Those renegotiations could happen in or out of court, and will likely involve some plan administrators, she predicted.

The emergency access Congress gave workers "financially affected" by Covid-19 to their retirement dollars can't be blocked by an alternate payee with an unfinished QDRO, warned Louise Nixon, CEO and founder of California-based QDROCounsel. That means if a participant pulls money out now, the non-withdrawing spouse loses out on a fuller lifetime benefit.

"You can only divide money that's still in the account," she said.

Advocates at the nonprofit Pension Rights Center said they aren't aware of hard data regarding the number of QDROs executed per year, but they encourage anyone due retirement benefits to claim them.

By The Numbers

Chawla said QDROs built around a negotiated sum, such as a $100,000 payout, rather than a percentage of the accrued assets may have to go back to court to recoup pandemic-related losses.

"The value of these accounts is dropping drastically. We don't know if they're going to go back up," she said of the harsh reality facing stock-heavy retirement plans.

Two ways Chawla said QDRO filers could proceed include:

- Pure violations: QDRO filers argue that they didn't receive the exact figure (such as $100,000) specified in their court-authorized agreement, so the filing must be adjusted accordingly or resubmitted.
- Fine-tuning: QDRO filers still going through the process would ask to renegotiate the terms or seek mediation to account for potential benefits wiped out during quarantine.

If the financial hit has been particularly devastating, Chawla said a case could be made for seeking assets outside the participant's retirement accounts to make alternate payees "whole."

"If you're expecting $250,000 to get you through the rest of your life, where else is that money going to come from?" she said.

Plan administrators could get dragged into these battles to verify the "intent" of pending QDROs, according to Chawla.

"The plans aren't and shouldn't be in the middle," she said. "But I can see that happening because there might be no other alternative."

Nixon described a QDRO she filed in January as perfectly illustrating how quickly everything has fallen apart.

The two parties agreed to split a set amount of money. The account has shrunk by half since then. And inoperable courts make it impossible to fix the ongoing damage.

“Now there’s not enough money in the account to pay her,” Nixon said, adding, “Nobody counts on a global pandemic when they’re writing these documents.”

Steven Abel, founder of Abel QDROs in New York, stressed that evaporating account balances hurt both parties in QDRO cases. He said weaving gains or losses clauses into the court orders can help filers better control their financial stake. But a bear market is still going to take its toll.

Time, and neglect, are far bigger threats to potential QDRO beneficiaries in his opinion.

Abel estimated that maybe 25% of divorce cases that would benefit from filing a QDRO actually do so. Even those that are aware of the issue, often let things slip. As evidenced by the QDRO cases Able said he’s filed decades after couples officially divorced. “There are those who need them and agree to them but still don’t do it,” he said.

That lack of follow through can be costly.

“One day you wake up and the money’s gone,” Abel said of the worst case scenario.

If nothing else, Nixon said this crisis has spurred indecisive parties to take QDROs more seriously.

“People are making sure to get things lined up so they can file once this is over,” she said.

To contact the reporter on this story: Warren Rojas in Washington at wrojas@bloomberglaw.com

To contact the editors responsible for this story: Seth Stern at sstern@bloomberglaw.com, Jo-el J. Meyer at jmeyer@bloomberglaw.com